

## FIU Law Review

---

Volume 2 | Number 1

Article 8

---

Winter 2007

### The Future of the Press in a Time of Managed News

Michael J. Gerhardt

*University of North Carolina Law School*

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>

 Part of the [Other Law Commons](#)

---

Online ISSN: 2643-7759

#### Recommended Citation

Michael J. Gerhardt, *The Future of the Press in a Time of Managed News*, 2 FIU L. Rev. 41 (2007).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol2/iss1/8>

This Symposium is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact [lisdavis@fiu.edu](mailto:lisdavis@fiu.edu).

# The Future of the Press in a Time of Managed News

*Michael J. Gerhardt*<sup>1</sup>

## INTRODUCTION

The press, whose freedom the First Amendment expressly guarantees, is not what it used to be. The increasing phenomenon of managed news—news reporting that is controlled by major corporations and programmed to enhance the profits of the corporate owners—may require more, not less, regulation of the institutionalized press. By almost all accounts, the press—or at least the institutionalized press—is not as independent from governmental control or profit motives as it once might have been. Moreover, it has become so dependent on and intertwined with commercial interests that it has begun to impede rather than fulfill the values that the First Amendment’s guarantee of the freedom of the press was designed to achieve. We live in an era in which managed news may actually undermine the independence of the press, and may rob it of the incentives which it needs to have in order to merit special constitutional protection. In this Essay, I consider how various developments—including the consolidation of corporate ownership of the media and the rise of the Internet—may have diminished the independence of the press, and the ramifications of the transformation of the press for the future of the constitutional guarantee of the freedom of the press.

## I. WHO COUNTS AS THE PRESS?

The first problem is figuring out who qualifies as the press for purposes of First Amendment protection.<sup>2</sup> Unfortunately, there is very little definitively known about what the Framers or the Ratifiers meant by “freedom of the press.” The debates in the First Congress, which proposed the Bill of Rights, are brief and unenlightening. Early state constitutions generally included similar protections, but we have no record of detailed dis-

---

<sup>1</sup> Samuel Ashe Distinguished Professor of Constitutional Law & Director of the Center on Public Law, University of North Carolina Law School. This Essay is an extended version of my remarks as a panelist on The Future of the Press in a Time of Managed News, held at the 2005 Association of American Law Schools Annual Meeting

<sup>2</sup> The First Amendment provides in pertinent part that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. CONST. amend. I.

cussions about what those protections entailed. We can find references by some Framers about the values that protecting freedom of the press would promote—free and open debate among an informed citizenry, the search and attainment of truth, scientific progress, cultural development, increasing public virtue, and checking governmental misconduct. We know that the fundamental question raised in free press debates has been whether the First Amendment protection of the freedom of the press only prohibited prior restraints on publications critical of the government, or whether it forbade punishment for “seditious” speech once it was made. Yet, the historical record is devoid of any apparent consensus or extended discussion among the Framers and Ratifiers (and of the public generally at the time) about who or what qualifies as “the press” for purposes of First Amendment freedoms.

Against this backdrop, the Supreme Court has been relatively flexible in answering the question about the meaning and scope of the First Amendment’s protection of the freedom of the press. It has ruled that the First Amendment prohibits both prior restraints<sup>3</sup> and sanctions against speech critical of the government unless the speech were likely to incite imminent lawlessness and was expressed for the purpose of inciting such lawlessness.<sup>4</sup> The Court has further ruled that the freedom of the press protection of the First Amendment may be extended to speakers and writers, regardless of whether they are members of the institutionalized press, and largely regardless of the medium through which they communicate.<sup>5</sup> The Court has not recognized any special First Amendment protections for newspapers,<sup>6</sup> and it has rejected (at least thus far) a constitutionally protected right for

---

<sup>3</sup> *Alexander v. United States*, 509 U.S. 544, 550 (1993) (holding that the term “prior restraint” is used to describe an order prohibiting certain communications, an utterance or publication, of particular information or commentary prior to the time such communication occurs); *see, e.g., Near v. Minnesota ex rel., Olson*, 283 U.S. 697 (1931).

<sup>4</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1960) (holding that words that incite imminent lawless action fall outside the First Amendment’s protective sphere).

<sup>5</sup> “Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’ . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . .”

*Branzburg v. Hayes*, 408 U.S. 665, 704-705 (1972) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). *See also Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring) (stating that “[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it” and the liberty of the press “is no greater and no less than the liberty of every citizen of the Republic”).

<sup>6</sup> *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937) (holding that the publisher of a newspaper has no special immunity from the application of general laws, nor any special privilege to invade the rights and liberties of others).

journalists to maintain the confidentiality of their sources.<sup>7</sup> (Consequently, it has effectively left federal or state legislatures with the discretion to enact shield laws to protect members of the press from being forced to breach the confidentiality of their sources.) Moreover, the Court has ruled that radio and television broadcasters receive less constitutional protections than other speakers in order to preclude chaos on the airwaves and to ensure that radio and television broadcasters fulfill a unique mission of educating the public.<sup>8</sup> The Court has extended First Amendment free press and speech protections to speech not only about political matters but also virtually any other subject of public interest or concern, including art and entertainment.

While it is clear the press does not receive any special protection simply because it calls itself the press,<sup>9</sup> we can imagine that the people who work for the institutionalized media are probably likelier than most other people to engage in the kinds of activities and expression that are protected by the First Amendment. The problem for the institutionalized press may be, however, the increasing extent to which it has been undermining, rather than facilitating the fulfillment of, First Amendment values. The problem may be, in other words, the increased need for governmental regulation of big media in order to protect the freedoms of the press and speech. It thus becomes necessary to consider the extent to which some developments require more, not less, regulation of the press.

## II. THE RISE OF CORPORATE OWNERSHIP

The story of the rise of corporate dominance of the news is not new. As several commentators have suggested,<sup>10</sup> fewer businesses control the media than once was the case,<sup>11</sup> and the increasing consolidation of corporate ownership of the media may pose a genuine threat to the First Amendment values, including an independent journalism.<sup>12</sup> The problem with the dominance of the media by a few corporations is their predisposition to use their market power to stifle competition, to maximize their profits, to find

<sup>7</sup> *Branzburg*, 408 U.S. at 690.

<sup>8</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection”).

<sup>9</sup> See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991) (holding that there are no First Amendment press defenses or privileges available against tort or contract liability for newsgathering).

<sup>10</sup> See, e.g., RANDALL P. BEZANSON, *HOW FREE CAN THE PRESS BE?* (2003); PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* (2004).

<sup>11</sup> Approximately six large corporations control nearly ninety percent of all major media outlets. Christa Corrine McLintock, *The Destruction of Media Diversity, Or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 571 (2004). ABC is controlled by Disney. *Id.* at n.15. NBC is owned by General Electric. *Id.* CBS is controlled by Viacom. *Id.* at 573.

<sup>12</sup> Jonathan Mermin, *Free But Not Independent: The Real First Amendment Issue for the Press*, 39 U.S.F. L. REV. 929, 962 (2005) (asserting that the “existence of more and more varied media entities should result in more independent journalism”).

ways to make political leaders beholden to them, to curry favor and receive favorable treatment from them, and to stop the free flow of ideas. For example, the rise of corporate ownership of the media may coincide with (or explain) an increased reluctance to antagonize governmental leaders.<sup>13</sup> Consider, for instance, the relative ease with which certain networks seem to cave into threats of substantial fines for indecency issued by the Federal Communications Commission.<sup>14</sup> In legislation passed earlier this year,<sup>15</sup> the Congress substantially increased fines for indecency.<sup>16</sup> Potential fines may be so high that it is practically impossible for them to escape the attention of network executives and programmers,<sup>17</sup> or to avoid influencing choices made about programming.<sup>18</sup> Moreover, corporate dominance of the media raises new entry-level costs for entrepreneurs; fewer individuals and small businesses are able to operate as the press or as media outlets.<sup>19</sup> Large companies find it increasingly easy to squeeze small operators, consolidate monopoly power, and sustain profits by selling airtime to advertising agencies, who in turn have worked to standardize the entertainment and the news to provide the most effective vehicle for selling their products.

There may be, however, at least four reasons not to overstate the possibility that the rise of corporate ownership of the media may destroy the

---

<sup>13</sup> For example, following the *Village Voice's* merger with the New Times Media corporation, James Ridgeway, the paper's Washington correspondent and main investigative journalist, was fired because of his critical news coverage of the Bush administration. *Village Voice Shake-up, Top Investigative Journalist Fired, Prize-winner Writers Resign Following Merger with New Times Media*, Apr. 13, 2006, <http://www.democracynow.org/article.pl?sid=06/04/13/145245> (last visited Nov. 20, 2006). See also Tim Goldstein, *The Firing of Peter Arnett*, THE NATION, Apr. 28, 2003, at 7 (stating that Arnett, National Geographic reporter on assignment in Baghdad, was fired for saying that the U.S. coalition's initial war plan wasn't working).

<sup>14</sup> Some networks cave into the threat of fines for indecency by using a five-second delay with live broadcasts. John Eggerton, *ABC to Tape Delay Super Bowl*, *Broadcasting & Cable*, Feb. 3, 2006, <http://www.broadcastingcable.com/article/CA6304641.html?display=Breaking+News> (last visited Nov. 20, 2006). While other networks, such as PBS, use bleeps and blurred lips in response to the FCC's threat of fines. Jeremy Egner, *PBS Hopes Bleeps and Blurred Lips Keep FCC Fines At Bay*, CURRENT, Jun. 26, 2006, <http://www.current.org/fcc/fcc0612indency.shtml> (last visited Nov. 20, 2006).

<sup>15</sup> Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491.

<sup>16</sup> Frank Ahrens, *The Price for On-Air Indecency Goes Up: Congress Approves Tenfold Increase in Fines FCC Can Assess*, WASH. POST, June 8, 2006, at D1. Prior to the fine increase, the FCC could impose a maximum fine of \$32,500 on radio and television broadcasters that air indecent material between the hours of 6 PM and 10 PM. *Id.* The law raises the maximum penalty to \$325,000. *Id.* The statute permits the FCC to impose one fine per program that may include several incidents of indecency, or the FCC may choose to fine each incident of indecency within the program. *Id.*

<sup>17</sup> ABC, CBS, NBC, Fox, and more than 800 affiliated television stations have filed suit to overturn the indecency rulings, thereby potentially becoming the test case for broadcasters' intent on challenging the indecency rulings. *Id.*

<sup>18</sup> The WB edited entire scenes out of its program, "The Bedford Diaries," for fear that it would be fined for violating the FCC's indecency rules. Bill Carter, *WB Worried About Drawing Federal Fines, Censors Itself*, N.Y. TIMES, Mar. 23, 2006, at C1.

<sup>19</sup> See generally Ted Turner, *My Beef With Big Media: How Government Protects Big Media and Shuts Out Upstarts Like Me*, 57 FED. COMM. L. J. 223 (2005).

independence of the institutionalized press. The first is the need for more empirical evidence to support predictions of the end of freedom of the press as we know it. We need empirical data to substantiate both the consolidation of corporate ownership *and* the corresponding declines in the quality of news reporting and independent journalism. Neither regulators nor scholars have identified the tipping point for the rise in corporate ownership to produce a genuine and enduring decline in the quality and independence of news coverage. It's simply a matter a speculation, at least so far, as to whether, say, having a few—or a few dozen—corporations controlling the media is enough—or not enough—to ensure the minimum qualities of reporting and independence required for the first amendment freedom of the press to remain viable. We do not know the number of corporations controlling the media below which we can be sure the independence of the press has been fatally sacrificed or the number above which we can be sure of avoiding a crisis. We do not even know whether big or small presses are more effective at checking governmental abuse.

Second, the rise of corporate ownership of the media coincides with an increasing diversity in the outlets for expressing political and other opinions. The revenues of the three major networks are declining,<sup>20</sup> while the sources and kinds of news organizations are more diverse and more numerous than ever before. Even if the “big three” television network news organizations are ignoring some story or not pressing a story hard enough (for instance, the support for President Bush's originally stated reasons for invading Iraq), it is likely other outlets, somewhere, are doing that. These could include (but are not limited to) such diverse media as online news services, blogging, satellite radio, cable news, access channels, magazines, and newspapers. We need to measure the effectiveness of the checking of governmental abuse and news reporting that these various outlets provide. The anecdotal evidence is well known. For instance, we know that bloggers were among the first—if not the first—to expose publicly the mistakes that brought down Dan Rather, among others, at CBS Evening News;<sup>21</sup> that

<sup>20</sup> The rise of cable networks, the Internet, and other entertainment options has cut into the revenues of all four major networks. Frank Ahrens, *NBC Taking Big Step Back from Television*, WASH. POST, Oct. 20, 2006, at A1. NBC, for example, said it will cut \$750 million from its budget by 2008 to stay competitive. *Id.*

<sup>21</sup> *Dropping the Anchorman: Dan Rather's Retirement Marks a Welcome Change in American Journalism*, ECONOMIST, Nov. 27, 2004, at 36. When the CBS program, “60 Minutes,” raised questions about President George W. Bush's service in the Texas National Guard, Dan Rather claimed to have documents proving that Bush had violated a direct order to undergo a physical examination and that his superiors were pressured to doctor his evaluation. *Id.* Only 14 hours later, an internet blogger proved that the documents were false after noticing that the memoranda on which Rather was relying had been typed on a computer, which did not exist at the time that the documents were allegedly written. Jack Kelly, *Iraq, Vietnam, MSM, & Dan Rather*, June 23, 2006, [http://72.14.209.104/search?q=cache:7ak\\_J3\\_ILXoJ:www.realclearpolitics.com/articles/2006/06/vietnam\\_iraq\\_dan\\_rather\\_the\\_ms.html+bloggers+expose+Dan+Rather&hl=en&gl=us&ct=clnk&cd=16](http://72.14.209.104/search?q=cache:7ak_J3_ILXoJ:www.realclearpolitics.com/articles/2006/06/vietnam_iraq_dan_rather_the_ms.html+bloggers+expose+Dan+Rather&hl=en&gl=us&ct=clnk&cd=16) (last visited Nov. 20, 2006).

Republican leaders and Christian groups helped to block a movie planned by a major network depicting President Reagan in a negative light;<sup>22</sup> and that pressure brought publicly by some ex-officials in the Clinton administration (and other media organizations) delayed an ABC network film with at least one scene suggesting Clinton's National Security Adviser was primarily responsible for 9/11.<sup>23</sup> But we still need to know more, much more, about the ways in which media organizations of various sizes and means check themselves and the government in order to render any definitive findings about the checking function of the media.

Third, we need to clarify why the major networks sometimes cave into pressure too easily. There is anecdotal evidence suggesting this, including the rather disturbing revelations made by, among others, Paul Krugman<sup>24</sup> and Paul Starr<sup>25</sup> that the FCC may either err or distort the numbers of complaints it reports it has received against certain broadcasts. But we need to verify the extent to which FCC fines influence broadcast decisions and protected speech, and we need to clarify who keeps the FCC in check.

Fourth, we need to know how often and why the major networks are reluctant to challenge governmental policies. We know from anecdotal evidence that some networks sometimes pull their punches rather than fight the government, and that major newspaper reporters first publicized the torturing of some detainees and the existence of CIA prisons abroad.<sup>26</sup> If some news organizations are performing the traditional checking function against governmental misconduct, then our system may not be nearly as broken or lost as some pundits suggest.

### III. THE RISE OF SOFT NEWS

Another growing development in the media may be connected to—or may be the result of—the rise in corporate ownership of national media. This development is the well-documented rise in the reporting of soft,

---

<sup>22</sup> CBS canceled its miniseries, "The Reagans," after extraordinary pressure from conservative groups. CBS Pulls Reagan Miniseries, (Nov. 5, 2003), <http://www.cnn.com/2003/SHOWBIZ/TV/11/04/cbs.reagans.ap/> (last visited Jan. 2, 2007). A CBS network executive anonymously defended the decision saying that "it does not present a balanced portrayal of the Reagans for CBS and its audience." *Id.*

<sup>23</sup> Tom Shales, *ABC's Twisted "Path to 9/11"*, WASH. POST, Sept. 9, 2006, at C1. Sandy Berger, former National Security Adviser to Bill Clinton, and Madeline Albright, former Secretary of State to Clinton, both wrote to the co-chairman of the 9/11 Commission and the film's consultant, urging him to use his influence to get ABC to withdraw the broadcast of the film. *Id.*

<sup>24</sup> See Paul Krugman, *In Media Res*, N.Y. TIMES, Nov. 29, 2002, at E39.

<sup>25</sup> See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* (2004).

<sup>26</sup> Seymour M. Hirsh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

rather than hard, news.<sup>27</sup> Hard news, which is what the media supposedly reported until fairly recently, consists of basic facts and figures. In the parlance of journalists, hard news is the who, what, when, why, and how of a public event. Soft news consists of speculation or opinion. It is what some people might call info-tainment. At its worst, news shows—or programs that call themselves news shows—are less interested in educating or informing their audiences than they are in entertaining them. These shows, particularly on cable, opt for dramatic clashes between guests who have sharply different opinions rather than discussions of the nuances of the public policy under consideration. Soft news dominates national network news on television and the radio, local news, cable, and the Internet. The 24-hour news cycle allows—if not demands—the rise in soft news as the various news outlets compete for the audience's attention and interest.

While the rise in soft news may be good for profits or viewership, it may undercut the media's need for special constitutional privileges. The classical reasons for providing the media with special First Amendment protection include checking governmental misconduct, helping people figure out the "truth" about public issues, promoting a tolerant society, contributing to the marketplace of ideas, venting frustration over public affairs, and making government function more like a town-hall meeting. Rather than facilitate any of these functions, the peddling of soft news may affirmatively impede each of them. Soft news is not information people may use to become better citizens; it is information that entertains the audience. Just as bad, the proliferation of soft news makes getting hard news more difficult. The media hardly merits special protection if it is making public discourse worse rather than better.

One reason that the problems posed by the rise in soft news may not be so bad is that hard news is still widely available. In fact, people may not have to work all that hard to find real news from such diverse sources as major newspapers, magazines, and the Internet. Nevertheless, it is not clear how many people avail themselves of these other sources. Studies have long shown that people generally gravitate toward the news sources that reinforce what they already think. Moreover, the Internet is a source of entertainment at least as much, if not more than, a source of hard news; and newspapers are declining both in numbers and readership. If public polling provides any insight into people's familiarity with hard news, it is not reassuring. The public remains ill-informed about public affairs, as reflected, for instance, in the fact that more than 30% of the public continues to believe—with no apparent basis in fact—that Saddam Hussein was responsi-

---

<sup>27</sup> See, e.g., Survey Report, Pew Research Center for People and the Press, *How Journalists See Journalists in 2004*, at 9-10, available at <http://people-press.org/reports/pdf/214.pdf> (last visited Nov. 20, 2006).



ble for the horrible attacks against the United States on September 11, 2001.<sup>28</sup>

It is important to keep in mind that the press may merit special constitutional protection apart from its educating the public about hard news. It is possible, if not probable, that most of the public simply is not interested in hard news; and the public generally may pose a threat to First Amendment values because of many people's preference to silence expression that is offensive to them. Apart from ensuring that everyday Americans become better citizens, the press may perform other functions requiring special constitutional protection. This is true as long as David Anderson is wrong when he suggests that various forces make "the demise of the press as a largely preferred institution quite possible and perhaps even probable."<sup>29</sup> He is only partly referring to the possible problems resulting from the consolidation of corporate ownership of the media, though this development may coincide with (if not explain) the demise of some prominent news outlets, including major newspapers. We need to examine more closely whether the increasing demise in newspapers (and perhaps news organizations that operate independently from the entertainment divisions of their corporate owners) is a symptom of a larger problem with the media requiring an alteration in how we implement the First Amendment's protection of the freedom of the press.

#### IV. THE DECLINE OF NEWSPAPERS

Newspaper readership, production, and quality are all sharply declining. While observers generally agree that these declines are occurring, they disagree over the possible causes. Some commentators suggest the declines are attributable at least in part to the rise of the Internet and the 24-hour news cycle, which make it much easier for many people to get the news when they want it, from a source that reinforces their world-view, and oftentimes for less. Online, newspapers may be able to compete with some of these alternative outlets, but in print newspapers cannot. Consequently, fewer newspapers are actually operating, and they have tighter budgets, which in turn cause them to reduce their staffs and to depend on reports (and reporters) from other organizations. The public reacts to these changes by opting for more accessible sources of information and more soft news, which they are likely to find on the Internet or cable television. Some commentators go further to blame the newspapers for their own decline. They suggest that the newspaper industry generally has a fixed internal hierarchy that prevents it from moving more quickly with the times and that

---

<sup>28</sup> Dana Milbank and Claudia Deane, *Hussein Link to 9/11 Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, at A1.

<sup>29</sup> David Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435 (2002).

newspaper journalists are less in touch with the changing society and economy. Very well-educated or affluent people may continue to read newspapers, but they do not represent a large enough clientele to make newspapers generally as profitable as they once were. If newspapers change at all, it is not necessarily by maintaining higher standards than other media outlets (or bloggers); it may be by either lowering their standards, printing more soft news, or both.

There may be more encouraging—or at least less discouraging—news about the state of newspapers than meets the eye. First, many newspapers are adding new sections and are increasing their web content. Not all newspapers choose to fight the Internet. Instead, they may see it as an ally in disseminating their reports and in attracting readerships. For instance, the Washington Post has purchased Slate, a popular online news source. On the Internet, people generally consult more than one news source. Because many people are not paying money to the different news sources they consult on the Internet, the challenge for newspapers is to find some other way to make profits. The New York Times, for instance, has begun to assess relatively small charges for access to some of its reports, and most newspapers sell advertising space on their websites. It remains to be seen how many newspapers can maintain enough profits to maintain their traditional formats and their websites at suitably competitive levels.

Second, newspaper journalists continue to have more thorough and professional training than other media outlets. Newspaper journalists hold themselves to higher standards than other media outlets, some of which do not have any apparent standards at all. While it is true that those in charge of major newspapers can still make terrible judgments (The New York Times, for instance, when it printed news stories by Jayson Blair which turned out to be fiction),<sup>30</sup> they generally seem to make fewer mistakes in reporting and their judgments seem sounder than many of those reporting through other, informal outlets, such as bloggers.

Third, some newspapers are looking for other ways to evaluate what they are doing. For instance, some are no longer looking at just circulation numbers, which reflect how many newspapers have been sold; instead, they are looking at “readership” numbers, which reflect how many people may be counted on as regular or constant readers. While from this perspective the readership of some newspapers is actually increasing, profits may not be. Ad space sold in newspapers still is sold at a higher rate than the ad space that is sold on the website. In addition, classified advertisements, which used to be the source of a substantial amount of a newspaper’s reve-

---

<sup>30</sup> Dan Barry, David Barstow, Jonathan D. Glater, Adam Liptak, and Jacques Steinberg, *Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, at A1.

nue, are declining at least in part because some online services, such as Craig's List, provide classified ads for free.

Fourth, newspapers are often the only or primary source of local news. With more local newspapers now managed by businesses headquartered elsewhere, they have included more wire reports and less local news. These corporations are interested in the bottom line; they will print what they believe people will buy newspapers to read. This may rarely be hard news, as we have seen. When some newspapers do publish local news published in the newspapers, it tends to be about crime, politics, or other salacious material. It is, however, possible that many people may want to know more about what is happening in their communities than just these discrete areas. There may be other developments—say, in the arts—that many people within a community may want more information that is unavailable – unreported, that is—elsewhere.

Fifth, the decline of newspapers has not coincided with a decline in magazine readership.<sup>31</sup> Many magazines remain profitable, though readership is sometimes declining. There are a few magazines that specialize in hard news, but most magazines maintain their level of success by both coordinating online reporting and increasing the amount of soft news in their publications. Hard news can still be found, but it may not be in the same places as it used to be or in the same quantities as magazines used to print.

What people want to read is a persistent focus of analysis of the state of newspapers or the press generally. Statistics verify what we already know—many people are increasingly turning to the Internet as their primary source of news. What these people do is, however, telling—they tend, not surprisingly, not to use the Internet to discover new things or to be exposed to new ideas. They use the Internet for entertainment or to reinforce what they already believe. People will gravitate away from news reports they find offensive or news sources that do not square with their worldview. One place to which people are increasingly turning to is blogging. It is a source of information and entertainment to which I turn in the next section.

## V. BLOGGING

My friend, Glenn Reynolds, recently published a book whose title encapsulates its main thesis—*An Army of Davids: How Markets and Technology Empower Ordinary People to Beat Big Media, Big Government, and*

---

<sup>31</sup> Jeff Bercovici, *Fact: Magazine Readership Is Up*, Aug. 28, 2002, [http://www.medialifemagazine.com/news2002/aug02/aug26/3\\_wed/news1wednesday.html](http://www.medialifemagazine.com/news2002/aug02/aug26/3_wed/news1wednesday.html) (last visited Nov. 20, 2006). In the U.S., magazine readership increased 5.3% among adults from 1998 to 2000. *Id.*

*Other Goliaths*.<sup>32</sup> Professor Reynolds manages one of the most widely read blogs on the Internet, and his book describes how the proliferation of new technologies will allow ordinary citizens to take charge of their lives, to keep government in check, and to pursue our dreams. He recounts, as have many reviewers of his book, the many ways in which bloggers have kept the institutionalized press in line and even shaped news events. While blogs are highly unlikely ever to replace newspapers or magazines, they are already an important, additional source that reporters and others consult on breaking stories (and in figuring out what may be breaking stories). Thus, blogs have become both alternative and additional sources of news and entertainment.

Blogs have both their fans and their critics. The fans often find their own opinions reinforced or mirrored back to them. In addition, blogs are empowering, for anyone with a computer (or at least regular access to a computer) can be a blogger and can have his or her own opinions published to the world. Blogging requires no additional expenditure of money other than the money used to purchase or rent a computer or to pay for access to one. Otherwise, blogging merely costs the time and effort required either to write or to read them. The stories are legion about how bloggers have provoked or fueled a number of real news stories and events. The critics of blogging cite, as I have already done, the fact that blogs are unregulated. Each blogger is a standard unto himself or herself. There is no uniform standard that bloggers have to meet, and blogging does not require any formal (or perhaps any) training at all. Because blogs are not regulated or subject to uniform standards, it becomes easy for bloggers to express reckless opinions, spread falsehoods, and engage in defamation. (Some bloggers get into trouble for this, while others seem to relish doing all this.) Since bloggers generally lack the resources of professional journalists, they cannot do the kinds of exposés and investigative reporting that professional journalists do for the television networks (say, on 60 Minutes) or in major newspapers. Blogging ends up peddling soft news more than anything else and perhaps some of the least respectable kinds, even though (or maybe because) there is a rather large market consuming its product.

I am not sure I agree, however, with Professor Reynolds's prediction that that new technologies will eventually both empower ordinary citizens to unprecedented degrees and correspondingly reduce the power and influence of major corporations and the national government. It is possible that, if past is prologue, the few corporations with a stranglehold over network and cable news and terrestrial radio will eventually collapse because of antitrust problems, bad decisions, and infighting. It is possible that blog-

---

<sup>32</sup> GLENN REYNOLDS, *AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS* (2006).

ging succeeds less because of any new information or ideas it brings to light but rather because people read blogs for entertainment and to reinforce what they are already thinking and planning. To the extent that blogs are effective as a means for fighting abuse of power, it may be because people may already have been disposed to fight that abuse. The interesting question is how the people's disposition was initially set. I suspect blogging is rarely the answer to that question.

Blogging may nevertheless be able to take advantage (and flourish because) of something that is deeply characteristic of our times. People may have less time today to spend reading the news. At least one recent survey indicates that on average Americans work longer hours and more days than people in most other countries, including Japan.<sup>33</sup> Working longer and harder means having less time to expend on reading lengthy or detailed newspaper or magazine stories (among the traditional sources of hard news). Blogging may cater to the interests of many people because it does not require them to think or to work at understanding what they are reading. It may have value to them as entertainment; it is popular because it entertains *and* it entertains for free.

Blogging, along with the other new information technologies, probably will ensure that prior restraints become passé. Prior restraints are only effective and meaningful if they can block (in the few circumstances in which they may be permissible) the proliferation of the information being suppressed. But, new technologies make the instantaneous proliferation of news child's play. Once something reaches the Internet, it cannot be stopped. Bloggers, among others, will no doubt be emboldened by this development. The interesting question these circumstances raise are which, if any, checks are effective at stopping the spread of the false information, innuendoes, defamation, or other damaging speech that emboldened bloggers are likely to express. If courts are prepared to apply the traditional doctrinal checks to these abuses, then we have less to fear from completely unregulated blogging. In the absence of these checks, the only other check is the market, which encourages less, not more, responsible expression.

#### CONCLUSION

Blogging has the advantage of being one of the means by which we can keep the institutionalized press and perhaps the government in check, but it could be a less effective check on the press and the media if it were the only one available. One reason that the rises in corporate ownership of the media and of soft news and the declines in newspaper readership and circulation may not be troubling is the proliferation of media outlets abound

---

<sup>33</sup> *Americans Work Longest Hours Among Industrialized Countries*, International Labor Office News, Sept. 6, 1999, <http://www.hartford-hwp.com/archives/26/077.html> (last visited Nov. 20, 2006).

in this country. We have a surfeit of outlets for expression and for reporting (and evaluating) news. If the numbers of these outlets were to shrink or if blogging were to become the primary means by which the institutionalized press and the government may be kept in check, no one can say for sure—not even my friend Glenn Reynolds—whether it can or will be up to the task.

I am not alone in thinking that the greatest protection we can have against abuse of power by either the government or the institutionalized press is the cultivation of a First Amendment culture, by which I mean a culture consisting of people who are generally committed to the values that the First Amendment guarantee of the freedom of the press was originally designed to protect. Within this culture, the Supreme Court and other public institutions have critical, indispensable roles to play. The people cannot always be expected to defend First Amendment values, especially if they are either misinformed or feel threatened by new or contrary ideas and arguments. With the proliferation of media outlets, the marketplace of ideas has become increasingly difficult if not impossible to manage. But, without those outlets, I suspect there will be a much smaller, less rich marketplace of ideas to manage.